

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Modesto, California

September 5, 2013 at 10:00 a.m.

---

1. [13-91106-E-7](#) ERIC ANTHONY CONTINUED MOTION FOR RELIEF  
JAB-1 Pro Se FROM AUTOMATIC STAY  
7-23-13 [[34](#)]

BAYVIEW LOAN SERVICING, LLC.  
VS.

CONT. FROM 8-22-13

Local Rule 9014-1(f)(1) Motion - Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee and Office of the United States Trustee on July 23, 2013. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**PRIOR HEARING**

Bayview Loan Servicing, LLC seeks relief from the automatic stay with respect to the real property commonly known as 2404 Naas Court, Modesto, California. The moving party has provided the Declaration of Janine Gonzalez to introduce evidence which establishes that the Debtor is no longer the owner of the property, movant having purchased the property by way of a Grant Deed in Lieu of Foreclosure recorded on October 29, 2012. Debtors are tenants at sufferance, and movant commenced an unlawful detainer action in and received a Writ of Possession on June 21, 2013.

Movant has provided a certified copy of the recorded Grant Deed in Lieu of Foreclosure to substantiate its claim of ownership and a copy of the Writ

September 5, 2013 at 10:00 a.m.

of Possession. Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

## **CONTINUANCE**

The court continued the hearing as Debtor appeared at the August 22, 2013 hearing and represented that he had not received the pleadings until August 21, 2013 because of the misdirection of the United States Postal Service.

Debtor filed a pleading titled "Reconsideration of Judgment, Stay of Judgment Until Case Conflict of Interest Resolved/U.S. Trustee Robert T. Matsui (Office of the Trustee), Stay of Judgment Case Conflict of Interest Resolution Investigation Complete" on August 29, 2013. FN.1. All that was required by the court was for the Debtor to file his opposition to the Motion.

-----  
FN.1. The Debtor filed the opposition and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(1).  
-----

Debtor requests that the court stay the tentative ruling of August 22, 2013 to allow the moving documents that have been recently filed by the Debtor to the U.S. Trustee's office. Debtor states that there is a conflict of interest related to this case involving Movant and the U.S. Trustee. Debtor asks the court to afford the Debtor due process of law. Debtor seeks a stay of the tentative ruling not to exceed 45 days and not less than 30 days.

## **DISCUSSION**

As discussed at the prior hearing, the court has been presented with a Motion for Relief From the Automatic stay.

As previously stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. Section 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at \*8-\*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). In 2013 the Ninth Circuit Court of Appeals reaffirmed the limited scope of motions for relief in *Arkison v. Griffin (In re Griffin)*, 719 F.3d 1126 (9th Cir. 2013), stating,

"A proceeding to determine eligibility for relief from a stay only determines whether a creditor should be released from the stay in order to argue the merits in a separate proceeding. *Johnson v. Righetti*, 756 F.2d 738, 740-41 (9th Cir. 1985). Given the limited nature of the relief obtained through this proceeding and because final adjudication of the parties' rights and liabilities is yet to occur, a party seeking stay relief need only establish that it has a colorable claim to the property at issue. *In re Veal*, 450 B.R. 897, 914-15 (B.A.P. 9th Cir. 2011)."

This bankruptcy court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief. That litigation is left to a court properly exercising jurisdiction over the dispute and resolving those matter in a lawsuit between the parties. See Fed. R. Bankr. P. 7001 requiring an adversary proceeding if the bankruptcy court exercises federal court jurisdiction to determine the extent, validity, priority, or amount of an interest in or lien against property.

### **Opposition Stated by Debtor**

The opposition stated by the Debtor is summarized by the court as follows:

- a. The Debtor believes that he has "new evidence" by the way of documents provided to the U.S. Trustee.
- b. The "new evidence" shows a conflict of interest in this bankruptcy case.
- c. The request for a continuance "[i]s not being made based on litigations involving other entities."
- d. This DEBTOR'S request ...is being made solely in the name of JUSTICE, DUE PROCESS, and because the FACTS/TRUTHS of the new documents submitted will not only show but establish a clear CONFLICT OF INTEREST related to this case involving MOVANT and U.S. TRUSTEE ROBERT T. MATSUI/U.S. TRUSTEE'S OFFICE." [Emphasis in original.]
- e. If the court does not continue the hearing the Debtor will again "[b]e the VICTIM of CIVIL INJUSTICE, CIVIL LIBERTIES VIOLATIONS, and most of all been denied all CIVIL RIGHTS granted under the UNITED STATES CONSTITUTION." [Emphasis in original.]

Opposition, Dckt. 50. The Opposition is 44 pages in length, consisting of 3 pages of text and 41 pages of exhibits. Some of the exhibits are dated in 2007, including correspondence sent by the Debtor. Reference is made in these exhibits to a Ponzi Scheme and federal court prosecution thereon. It appears that Debtor's contention relates to the note and deed of trust, from which the Trustee's Deed is issued, was involved in some scheme which should make the note and deed of trust unenforceable.

This opposition misses the mark in connection with the Motion for Relief From the Automatic Stay. Debtor contends that he has or there is some conflict of interest relating to the U.S. Trustee or that he has given information to the U.S. Trustee about a conflict of interest. The Debtor does not clearly articulate this contention in his pleadings and it cannot be readily determined from the 41 pages of exhibits.

As addressed at the first hearing on this Motion, relief from the automatic stay is a summary proceeding. The Debtor has, and continues to have, the right to press his claims for lack of due process, violation of civil rights, civil liberties violations, and conflicts of interests in the courts of competent jurisdiction. That does not equate to the Debtor filing a Chapter 7 bankruptcy and using the automatic stay to enjoin the party he opposes from having those issues litigated in whatever court is properly exercising state or federal court jurisdiction.

Movant has provided the court with a properly authenticated document (certified copy) by which it asserts the right to possession of the Property at issue – the recorded Grant Deed in Lieu of Foreclosure to substantiate its claim of ownership in this Chapter 7 proceeding. In addition, Movant has provided the court with a properly authenticated judgment for possession writ of possession issued by the California Superior Court for the Property. Exhibit 4, 5. The judgment is against "Eric A. Crowder and all Unknown Occupants." The writ of possession is against Eric A Crowder, and the court struck out the additional judgment debtors listed as "All Unknown Occupants." On his petition and Schedules, the Debtor lists his name as Eric Anthony aka Eric A. Crowder. Dckts. 1, 28.

Movant has presented the court with a colorable claim by which it seeks relief from the automatic stay. This is a Chapter 7 case wherein neither the property nor any litigation prosecuted by the Debtor affects this bankruptcy proceeding. The Chapter 7 Trustee has filed her Report of No Distribution. August 29, 2013 Docket Entry. No claims or right to recovery monies from any person is listed on Schedule B. Dckt. 28.

There is sufficient evidence to grant the Motion for Relief. The Debtor and Movant have been, and can continue to litigate any dispute they have concerning Movant's right to possession of the Property. That issue cannot be determined in this Contested Matter – for which Movant has provided the court with its colorable claim to the Property. The Chapter 7 Trustee has weighed in, filing her Report of No Distribution.

Even if the Debtor were to commence an action to litigate his dispute in this court, there is little reason for either the District Court or this bankruptcy court to exercise the broad grant of federal court jurisdiction arising under 28 U.S.C. § 1334. A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction created by Congress and limited by the United States Constitution. See *Stern v. Marshall*, 564 U.S. \_\_\_\_\_, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. See *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda*

*v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction. FN.1.

-----  
FN.1. The court discussed with the Debtor at the first hearing on this Motion the issues relating to the proper exercise of federal court jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 - for matters arising under the Bankruptcy Code, arising in the bankruptcy case, and related to the bankruptcy case. The court provides this information in this ruling for the convenience of the Debtor. As discussed at the prior hearing, the granting of broad federal court jurisdiction under 28 U.S.C. § 1334 is not a wide-ranging grant for a bankruptcy judge or district court judge to do whatever he or she thinks is right merely because one of the parties filed bankruptcy. If the matter does not arise under the Bankruptcy Code or in the bankruptcy case, then a "related to" matter must have some impact on the bankruptcy case. Otherwise, the Constitutional limits on the exercise of federal judicial power become a mere shell which would be honored only in their breach.

Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

Sec. 2, Cl 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo*, 82 F.2d 121, 121-122 (9th Cir. 1936),

Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

-----

While the court cannot ascertain from the Opposition what non-bankruptcy federal issues may exist upon which the proper exercise of the federal judicial power may be exercised by a district court judge, no basis has been shown for there being a "bankruptcy related" federal law claim. The filing of a bankruptcy case is not the substitute for obtaining an injunction in the non-bankruptcy proceedings. Neither the district court judge nor the bankruptcy court judge, by virtue of the jurisdictional grant under 28 U.S.C. § 1334 sit as "super judges" to right whatever wrongs they may believe to exist in connection with other state or federal court judicial proceedings.

The court shall issue a minute order terminating and vacating the automatic stay to allow Bayview Loan Servicing, LLC, and its agents, representatives and successors, to exercise its rights to obtain possession and control of the real property commonly known as 2404 Naas Court, Modesto, California, including unlawful detainer or other appropriate judicial proceedings and remedies to obtain possession thereof.

The moving party has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a) (3).

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Bayview Loan Servicing, LLC and its agents, representatives and successors, to exercise and enforce all nonbankruptcy rights and remedies to obtain possession of the property commonly known as 2404 Naas Court, Modesto, California.

**IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a) (3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

2. [13-90908](#)-E-7 FELISIANO/MARIA VALLEJO  
BCP-3 Thomas O. Gillis

AMENDED MOTION FOR RELIEF FROM  
AUTOMATIC STAY  
8-15-13 [[30](#)]

NATIONSTAR MORTGAGE LLC VS.

CONT. FROM 8-1-13

Local Rule 9014-1(f)(2).

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on August 15, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law.

Nationstar Mortgage LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3157 Baker Street, San Francisco, California. The moving party has provided the Declaration of Monica Diaz to introduce evidence which establishes that the Debtor has defaulted on the loan and has received several notices of a Trustee's Sale.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 9013, upon which the request for relief is based:

- A. Movant seeks relief under 11 U.S.C. § 362(d)(4) and alleges that Debtors' bankruptcy is part of a scheme to delay, hinder and defraud Movant which involved numerous unauthorized transfers of interest in the subject property and multiple bankruptcy filings affecting the subject property.
- B. The scheme was initiated on January 2, 2010 by the filing of the first of what is now 34 bankruptcy petitions affecting the

subject property. These bankruptcies were filed by alleged co-trustees who purportedly held a fractional interest in the trust that owns the subject property and 30 out of 34 cases have been dismissed.

- C. For example, on March 17, 2011, Robert O'Connor recorded a Trust Transfer Grant Deed in the San Francisco County Recorder's Office that conveyed an interest in the Trust to himself, Jose L. Orosco and Martha Cornejo.
- D. On March 15, 2011, Jose L. Orosco and Martha Cornejo filed Chapter 13 bankruptcy petitions.
- E. In addition, O'Connor recorded a Trust Transfer Grant Deed in the San Francisco County Recorder's Office that conveyed an interest in the Trust to himself and Maria Vallejo.
- F. On April 9, 2011, Maria Vallejo filed a Chapter 13 bankruptcy petition.
- G. On May 13, 2013, Maria Vallejo and Felisiano Vallejo filed this instant Chapter 7 bankruptcy petition.

The Hugh Zhao Declaration states that borrower Robert O'Connor entered into a loan with SCME Mortgage Bankers, Inc. for \$2,283,000.00 secured by a deed of trust recorded against the subject property. The Zhao declaration states that in July of 2012, Movant acquired the servicing rights to and the beneficial interest in the loan and deed of trust. Mr. O'Connor defaulted on the loan payments, after which there were several unauthorized transfer of fractional interest in the subject property, without the knowledge or consent of Movant or its predecessors. O'Connor executed an unauthorized Grant Deed to "The Robert H. O'Connor Revocable Trust, Robert H. O'Connor, Marina Zelaya and Cutberto Cosio, as Co-Trustees." Exhibit 12, Dckt. 33. Thereafter, there were four (4) additional transfers of interests in the subject property. After the various transfers, many of the beneficiaries named in the trust filed for bankruptcy, thereby frustrating Movant's efforts to foreclose on the Property for over three years.

## **DISCUSSION**

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

11 U.S.C. § 362(d)(4) allows the court to grant relief from stay where the court finds that the petition was filed as part of a scheme to delay, hinder or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of secured creditors or court approval or (ii) multiple bankruptcy cases affecting the property. 3



Collier on Bankruptcy ¶ 362.07 (Alan N. Resnick & Henry J. Sommer eds. 16<sup>th</sup> ed.).

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Movant has provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject property. The unauthorized transfers of interests in the subject property to beneficiaries who then filed several bankruptcies were a deliberate attempt as a stay to any foreclosure. The court finds that the filing of the present petition works as part of a scheme to delay, hinder, or defraud Movant with respect to the Property by both the transfer of an interest in the property and the filing of multiple bankruptcy cases.

The court shall issue a minute order terminating and vacating the automatic stay to allow Nationstar Mortgage LLC, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property. The court also grants relief pursuant to 11 U.S.C. § (d)(4).

The moving party has alleged adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3).

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Nationstar Mortgage LLC, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 3157 Baker Street, San Francisco, California.

**IT IS FURTHER ORDERED** that relief is granted pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief from the stay, if recorded in compliance with applicable State laws governing notices of interests or liens in real property, shall be binding in any other case under this title purporting

to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except as ordered by the court in any subsequent case filed during that period.

**IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

3. [13-91315](#)-E-7      **APPLEGATE JOHNSTON, INC.**      **MOTION FOR RELIEF FROM**  
LS-1                      **George C. Hollister**                      **AUTOMATIC STAY**  
7-28-13 [[31](#)]

**COLLIER BUILDING  
SPECIALTIES, INC. VS.**

Local Rule 9014-1(f)(2) Motion.

Correct Notice Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 7 Trustee, and all creditors on July 28, 2013. The debtor was not served the Motion and supporting pleadings. By the court's calculation, 39 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay was not properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to deny the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

The Local Rules require that movant's notice of the hearing disclose whether or not written opposition to the motion is required. See Local Bankr. R. 9014-1(d)(3). The notice provided here did not so specify. This is

improper. Failure to comply with the local rules is grounds to deny the motion. See Local Bankr. R. 9014-1(l).

Moreover, the moving party filed the notice of motion, motion for relief from automatic stay, memorandum of points and authorities in support of motion, declaration and exhibits in this matter as one document. This is not the practice in the Bankruptcy Court. "Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents." *Revised Guidelines for the Preparation of Documents*, ¶(3)(a). Counsel is reminded of the court's expectation that documents filed with this court comply with the *Revised Guidelines for the Preparation of Documents* in Appendix II of the Local Rules, as required by Local Bankruptcy Rule 9014-1(d)(1). This failure is cause to deny the motion. Local Bankr. R. 1001-1(g), 9014-1(l).

Lastly, the motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 9013 because it does not plead with particularity the grounds upon which the requested relief is based.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the *United States Supreme Court in Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 9013 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the short-and-plain-statement standard for a complaint.

Law-and-motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a

creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

*Weatherford*, 434 B.R. at 649-650; see also *In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

*Martinez v. Trainor*, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points and authorities - buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent

on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations." FN.1.

-----

FN.1. Movant may want to argue that really, the motion is simple and the court should waive the rules in this Contested Matter. The problem with that argument than no attorney knows whether the rules are being enforced, when the rules are enforced, and what minimum level of practice they need to meet. Some attorneys have thought that a single 120 page electronic document, in which the first 20 pages was the combined motion and points and authorities, another 10 pages consisting of declarations, and then 90 pages of exhibits was a "simple document" for the court to review and the basic pleading rules should not be applied. The court has been very clear to all attorneys and other parties appearing. The rules will be evenly and uniformly applied to the parties. If it's a "simple matter," then it will be simple for the attorney to comply with the Federal Rule of Civil Procedure, Federal Rule of Bankruptcy Procedure, and Local Bankruptcy Rules.

-----

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief from the Automatic Stay is denied without prejudice.

4. [13-91315](#)-E-7    APPLEGATE JOHNSTON, INC.  
SK-2                    George C. Hollister

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
8-7-13 [[57](#)]

AFCO ACCEPTANCE CORPORATION  
VS.

CONT. FROM 8-22-13

Local Rule 9014-1(f)(2) Motion - Final Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice and Office of the United States Trustee on August 7, 2013. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **PRIOR HEARING**

AFCO Acceptance Corporation seeks relief from the automatic stay with respect to an asset identified as financing agreement with Debtor to cancel insurance policies and realize on the value of its collateral.

However, the pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required

debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Motivities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

The court also notes that what could be construed as the "motion" portion of the pleading fails to comply with Federal Rule of Bankruptcy Procedure 9013 which requires the motion (which is separate from the points and authorities) state with particularity the grounds upon which the relief is based. Rather, the "motion" just states a conclusion and directs the court write the motion for Movant.

#### **CONTINUANCE**

The court continued the hearing as Movant's "motion" portion of the pleading failed to comply with Federal Rule of Bankruptcy 9013. Movant filed a supplemental motion on August 29, 2013.

AFCO Acceptance Corporation seeks relief from the automatic stay with respect to an asset identified as premiums and dividends payable under financed insurance policies. The moving party has provided the Declaration of Patti L. Smith to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Smith Declaration states that the Debtor has not made 2 post-petition payments, with a total of \$37,024.44 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$129,585.54, as stated in the Smith Declaration, while the value of the asset is determined to be \$129,532.40, as stated in Schedules B and D filed by Debtor.

Movant argues cause exists under 11 U.S.C. § 362(d)(1) because its interest in the return premiums is not adequately protected and the value of the return premiums is declining and payments are not being made to protect its interest against such decline.

Movant argues that in the event that the Trustee asserts it is necessary to maintain the insurance, AFCO is entitled to adequate protection of its interest as provided in 11 U.S.C. § 361(1). In order to adequately

protect its interests in the value of its ever depleting collateral, AFCO is entitled to immediate payments to cure the outstanding arrearages under the PFA and an order requiring him to make timely all future payments due.

However, no response from the Trustee regarding whether it is necessary to maintain the insurance, the court find causes exists to grant Movant relief from the automatic stay.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court shall issue a minute order terminating and vacating the automatic stay to allow AFCO Acceptance Corporation, and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow AFCO Acceptance Corporation, its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as premiums and dividends payable under financed insurance policies, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.



**IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.

5.     13-90723-E-7     **JUAN RODRIGUEZ**     **MOTION FOR RELIEF FROM**  
          PD-1             **James D. Pitner**       **AUTOMATIC STAY**  
  7-17-13 [[14](#)]  
**U.S. BANK, N.A. VS.**

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on July 17, 2013. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief from the Automatic Stay is granted.** No appearance required.

US Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee (successor by merger to LaSalle Bank National Association) as Trustee for Morgan Stanley Mortgage Loan Trust 2007-3XS ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 1521 Bollinger Court, Modesto, California. The moving party has provided the Declaration of Katrina Mackey Carmon to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Katrina Mackey Carmon Declaration states that the Debtor has not made 23 post-petition payments, with a total of \$35,550.55 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$323,125.42 (including \$316,585.10 secured by movant's first trust deed), as stated in the Carmon Declaration, while the value of the property is determined to be \$81,754.00 as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The Debtor was granted a discharge on July 24, 2013. Granting of a discharge to an individual under Chapter 7 lifts the automatic stay by operation of law. See 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is denied as moot as to the Debtor. The Motion is granted as to the Estate.

The court shall issue a minute order terminating and vacating the automatic stay to allow US Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee (successor by merger to LaSalle Bank National Association) as Trustee for Morgan Stanley Mortgage Loan Trust 2007-3XS, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

Because the moving party has established that there is no equity in the property for the Debtor and no value in excess of the amount of the creditor's claims as of the commencement of this case, the moving party is not awarded attorneys' fees for all matters relating to this Motion.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow US Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee (successor by merger to LaSalle Bank National Association) as Trustee for Morgan Stanley Mortgage Loan Trust 2007-3XS, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 1521 Bollinger Court, Modesto, California.

**IT IS FURTHER ORDERED** that to the extent the Motion seeks relief from the automatic stay as to the debtor, who was granted a discharge in this case, it is denied as moot pursuant to 11 U.S.C. § 362(c) (2) (C).

No other or additional relief is granted.

6. [13-91235-E-7](#)      CHRISANTO/ANITA MARTINEZ      MOTION FOR RELIEF FROM  
PD-1                      Jessica A. Dorn                      AUTOMATIC STAY  
8-2-13 [[14](#)]

WELLS FARGO BANK, N.A. VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Chapter 7 Trustee on August 2, 2013. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

**Final Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Relief from the Automatic Stay is granted.** No appearance required.

Wells Fargo Bank, N.A. seeks relief from the automatic stay with respect to the real property commonly known as 1846 Gulfstream Drive, Modesto, California. The moving party has provided the Declaration of Katrina Mackey Carmon to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Katrina Mackey Carmon Declaration states that the Debtor has not made 2 post-petition payments, with a total of \$2,152.18 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$150,214.75 (including \$139,894.75 secured by movant's first trust deed), as stated in the Carmon Declaration, while the value of the property is determined to be \$129,000.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Wells Fargo Bank, N.A., and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 1846 Gulfstream Drive, Modesto, California.

No other or additional relief is granted.

7. [11-94146](#)-E-11 DOMINIC/MARIA DEPALMA  
TJS-1 David C. Johnston

CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
7-1-13 [[340](#)]

JPMORGAN CHASE BANK, N.A.  
VS.

CONT. FROM 8-22-13, 8-1-13

Local Rule 9014-1(f)(1) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors' committee or creditors holding the 20 largest unsecured claims, all creditors, parties requesting special notice, and Office of the United States Trustee on July 1, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

**The court's tentative decision is to deny the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **PRIOR HEARING**

JPMorgan Chase Bank, N.A. seeks relief from the automatic stay with respect to an asset identified as a 2011 Lexus ES 350, VIN ending in 17504. The moving party has provided the Declaration of Charlene Hartman to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Hartman Declaration states that the Debtor has not made 1 post-petition payments, with a total of \$607.99 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$18,219.15, as stated in the Hartman Declaration, while the value of the asset is determined to be \$31,000.00, as stated in Schedules B and D filed by Debtor.

However, Movant values the vehicle at \$28,717.00, according to *Kelley Blue Book*. The Hartman Declaration seeks to introduce evidence establishing the value of the asset. Though the *Kelley Blue Book* valuation is attached as an Exhibit, it is not properly authenticated.

The court will *sua sponte* take notice that the *Kelley Blue Book* can be within the "Market reports, commercial publications" exception to the Hearsay Rule, Fed. R. Evid. 803(17), it does not resolve the authentication requirement, Fed. R. Evid. 901. In this case, the court will presume the Declaration of Hartman to be that she obtained the *Kelley Blue Book* valuation and is providing that to the court under penalty of perjury. The creditor and counsel should not presume that the court will provide *sua sponte* corrections to any defects in evidence presented to the court.

### **Trustee's Opposition**

Michael D. McGranahan, the Trustee, opposes this motion. The Trustee acknowledges that the Debtors are delinquent on their payments, but suggests instead of relief from the stay, that the Trustee pays the secured creditor through insurance proceeds from a recent accident caused by a third party. The Trustee states that he is working diligently with the insurance company to explore different options. The Trustee states the cost of repairs to the Lexus total \$20,000 and in light of the high monthly debt services, the Trustee is not inclined to repair the vehicle. Rather, the Trustee is attempting to get the monies for the costs of the repairs, pay Movant a portion of the proceeds, pay Debtors the remainder of the proceeds and abandon the vehicle. If the insurance company is unwilling to give the Trustee, the Trustee would repair and sell the vehicle.

### **Discussion**

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

However, the existence of missed payments by itself does not guarantee relief from stay. Based on either the Debtor's valuation of \$31,000.00 or the Movant's valuation of \$28,717.00 and the outstanding obligation being \$18,219.15, there is sufficient equity to protect the Movant. Since the equity cushion provides enough protection to the creditor, moving party's motion for relief from stay is premature. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004).

### **CONTINUANCE**

The court continued the hearing as Movant and the Chapter 11 Trustee agreed to file a stipulation to relief from stay. The stipulation has not been filed to date.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Relief from the automatic stay is denied without prejudice.

8. 13-90643-E-12 GARY/CHRISTINE TAYLOR  
SW-1 Anthony D. Johnston

**CONTINUED MOTION FOR RELIEF  
FROM AUTOMATIC STAY  
8-12-13 [88]**

**WELLS FARGO BANK, N.A. VS.**

**CONT. FROM 8-29-13**

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor's Attorney, Chapter 12 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 12, 2013. By the court's calculation, 17 days' notice was provided. 14 days' notice is required.

**Tentative Ruling:** The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

**The court's tentative decision is to grant the Motion for Relief from the Automatic Stay.** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Wells Fargo Bank, N.A. ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2006 Travel Supreme Select, VIN ending in 54265. The moving party has provided the Declaration of Lakesha Brimage to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Brimage Declaration states that the Debtor has not made four (4) post-petition payments, with a total of \$13,169.70 in post-petition payments past due. From the evidence provided to the court, and only for purposes of



this Motion for Relief, the debt secured by this asset is determined to be \$291,160.92, as stated in the Brimage Declaration, while the value of the asset is determined to be \$185,000.00, as stated in Schedules B and D filed by Debtor.

Movant also states that pursuant to the terms of Debtor's Chapter 12 plan, Debtor intends to surrender the vehicle to movant.

The Brimage Declaration also seeks to introduce evidence from *Kelley Blue Book* establishing the value of the asset at \$171,750.00. Using either the Debtor's valuation or the *Kelley Blue Book* valuation, there is no equity remaining in the property, the debt secured by this asset being \$291,160.92.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Wells Fargo Bank, N.A., and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

The moving party has plead adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon

review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wells Fargo Bank, N.A., its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan documents granting it a lien in the asset identified as a 2006 Travel Supreme Select, VIN ending in 54265, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

**IT IS FURTHER ORDERED** that the fourteen (14) day stay of enforcement provided in Rule 4001(a)(3), Federal Rules of Bankruptcy Procedure, is waived for cause.

No other or additional relief is granted.